DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203 **Plaintiffs:** VET VOICE FOUNDATION, RANDY EICHNER, and JOHN ERWIN **v.** **Defendant:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State and **Intervenor Defendants,** VERA ORTEGON and WAYNE WILLIAMS	**□COURT USE ONLY□** Case No. 2022CV33456 Ctrm./Div.: 215
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THE SECRETARY'S REPLY IN SUPPORT OF MOTION TO DISMISS COUNT TWO

"[O]nly . . . those persons who are personally denied equal treatment by the challenged discriminatory conduct" have standing to assert an equal protection claim. *United States v. Hays*, 515 U.S. 737, 743-44 (1995). But after a year of litigation, and several months after receiving the identities of every Colorado voter who has had their ballot held for cure since 2018, Plaintiffs have been unable to find a single person who can allege their signature was not accepted because of their race or age. Nor can the organizational Plaintiff, Vet Voice, identify a single member, supporter, or even "constituent" who can say the same.

The question before the Court is narrow: Whether three White Plaintiffs over the age of 27 and a veterans advocacy organization can step into the shoes of Black, Hispanic, Asian, and young voters to advance claims alleging that Colorado's signature verification system discriminates against racial minorities and voters under the age of 27. The answer is No.

ARGUMENT

I. The Secretary's Motion is predicated on changed circumstances.

Earlier this year, the Secretary moved to dismiss the entire Complaint on the basis that Plaintiffs lacked standing. Mot. to Dismiss for Lack of Standing under rule 12(b)(1) (Feb. 28, 2023). The Court denied that Motion. Order on Mot. to Dismiss (April 17, 2023).

Subsequent case developments have undermined every one of the facts on which this Court relied to find standing, at least as to Count Two. Now, no Plaintiff has standing to maintain Count Two and the Court lacks subject matter jurisdiction over that claim. *See, e.g.*, *Hansen v. Barron's Oilfield Serv., Inc.*, 2018 COA 132, ¶ 7 ("Standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit.") (quotations omitted).

First, as to the individual Plaintiffs, the Court noted that each had had a ballot held for cure "in the recent past," and that "they fear future disenfranchisement through the rejection of their ballot signatures." *Id.* at 3. Implicit in this determination was that the Black and Hispanic Plaintiffs then entered in the case could plausibly allege that such treatment stemmed—at least in part—from disparate treatment based on race as alleged in Claim Two of the Complaint. *See* 2d Am. Compl. ¶¶ 108–14 (Feb. 3, 2023). That is no longer the case. And Plaintiffs do not argue that the remaining individual Plaintiffs have standing as to Count Two. *See generally* Pls.' Opp. to Mot. to Dismiss Count Two for Lack of Subj. Matter Jurisd. ("Pls.' Opp.") at 5–9 (Dec. 11, 2023) (relying only on Vet Voice's standing as to race-based claims).

Second, as to Vet Voice, the Court concluded that Vet Voice generally had standing under the test established in *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 511 (Colo. 2018) (establishing that an organization has associational standing where "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested requires the participation of individual members of the lawsuit."). Order on Mot. to Dismiss at 3 (April 17, 2023). Since the that Order, the parties have engaged in significant discovery. Vet Voice was required to articulate its interests and injuries under oath, and Plaintiffs received the identities of the "nearly 100,000" voters whose ballots were held for cure and not cured since 2018. Pls,' Mot. for Summ. J. ("Pls.' MSJ") at 1 (Nov. 7, 2023). Yet, despite Plaintiffs' breathless allegations about signature verification's "shameful disparate impact," *id.*,

they have not identified a single Plaintiff who can allege that their ballot was held for cure because of their race.

As to Count Two, the Court did not address in April whether Vet Voice had standing, on its own, to maintain that Claim. But now that no individual Plaintiff can maintain that Claim, the Court's subject matter jurisdiction rises and falls based on Vet Voice.

Plaintiffs argue repeatedly that the Secretary has waived her jurisdictional arguments. *See, e.g.*, Pls.' Opp. at 2. But subject matter jurisdiction cannot be waived. *See, e.g.*, *Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009). And Plaintiffs' repeated citations to Colo. R. Civ. P. 12(g), *e.g.*, Pls.' Opp. at 2, 8, 10, ignore the express provision of Rule 12 that governs; under Rule 12(h)(3), "whenever it appears by suggestion of the parties or otherwise that a court lacks jurisdiction of the subject matter, the court shall dismiss the action."[1] Where the parties to an action have changed, renewed challenges to subject matter jurisdiction are particularly appropriate. *See, e.g.*, *Grange Ins. Ass'n v. Hoehne*, 56 P.3d 111, 114 (Colo. App. 2002). In such cases, courts have expressly "decline[d] to adopt a rule that would prohibit a court from recognizing changed circumstances that may affect justiciability." *Id.*

The Secretary's Motion is not "a motion for reconsideration," nor does it raise issues in which the Court is bound by "the settled law of the case." Pls.' Opp. at 5. The Stipulated

[1] Interpreting an identical provision in the Federal Rules, the Tenth Circuit notes: "lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation." *Tuck v. United Servs. Auto Ass'n*, 859 F.2d 842, 844 (10th Cir. 1988) (quotations omitted).

Dismissal of the two non-White Plaintiffs materially alerted the grounds for subject matter jurisdiction in this matter, leading to the Secretary's new (and limited) Motion.

II. Plaintiffs lack standing to maintain a race-based claim.

A. Vet Voice lacks organizational standing for race-based claims.

Vet Voice cannot point to anything in its mission statement showing that it has standing to maintain a claim based on racial disparities. Nor can it point to a single statement in the record the parties have developed over the last several months. Instead, Vet Voice relies exclusively on an affidavit from its CEO prepared specifically to respond to this Motion to argue that signature verification adversely affects "one of Vet Voice's key goals . . . 'to mobilize the most diverse group of veterans and military families in history.'" Pls.' Opp. at 6. In other words, Vet Voice argues that because it seeks to advance the interests of veterans, and because some veterans are racial minorities, its mission is stifled by allegedly disparate treatment of racial minorities. This is insufficient to confer organizational standing for both factual and legal reasons.

First, Vet Voice has given the Court no reason to ignore their mission statement and deposition testimony, neither of which references the remediation of alleged racial disparities in voting. Vet Voice's mission includes nothing about a "focus[]" of "encouraging veterans and military families who are women and racial and ethnic minorities . . . to exercise their right to vote." *Compare* Decl. of Janessa Goldbeck (attached to Pls.' Opp.) ¶ 4 *with* Ex. D to Secretary's Mot. to Dismiss Count Two (Nov. 20, 2023).

And Vet Voice's own formulation of its injury does not encompass injury stemming from allegedly disparate treatment of racial minorities. *See* Secretary's Mot. to Dismiss Count Two at

9 (quoting Vet Voice's articulation of its alleged injury); *see also Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977) (standing requires an "injury in fact"). Vet Voice acknowledges that its sworn testimony did not encompass injury stemming from the disparate treatment of racial minorities, Pls.' Opp. at 6–7, but claims that is because the question did not "inquire[] about Vet Voice's goals and objectives relating to young and minority voters[,]" *id.* at 7. True. The question broadly asked about Vet Voice's injury, leaving ample room for Vet Voice to enunciate the full panoply of injuries they have suffered from Signature Verification. None involved disparate treatment of racial minorities.

In sharp contrast to its written mission statement and sworn testimony, Vet Voice now relies exclusively on a declaration from its CEO that was generated solely for litigation purposes. But because that declaration attempts to add things to Vet Voice's mission statement and contradicts Vet Voice's sworn testimony, it should be disregarded. *See, e.g.*, *Luttgen v. Fischer*, 107 P.3d 1152, 1156 (Colo. App. 2005) ("The sham affidavit doctrine permits a court under certain circumstances to disregard an affidavit submitted by a party . . . where that affidavit contradicts the party's previous sworn deposition testimony.").

Second, the harm alleged in Claim Two is that racial minorities are treated worse than similarly situated White voters. *See People v. Dean*, 2016 COA 64, ¶ 19. But the harm alleged by Vet Voice is one step removed. Vet Voice argues that because its mission is amplifying the voices of veterans, and because some veterans are racial minorities, its mission is harmed by the disparate treatment of racial minorities. But Vet Voice makes no effort to establish how its mission will be affected by a ruling in its favor.

For example, if allegedly disparate treatment is remedied by ensuring all voters receive the same treatment racial minorities currently receive, will that result in the de-amplification of veteran voices? Vet Voice has offered no reason why the *disparate* treatment of racial minorities affects its interest. Only that when the voices of racial minorities are "stifled by the Signature Verification Requirement," such "stifling" affects its mission. But that goes to Plaintiffs' First Claim," 2d Am. Compl. at 34 (Feb. 3, 2023), and is unrelated to disparate treatment.[2]

At most, allegedly disparate treatment of racial minorities has an "indirect and incidental" impact on Vet Voice's stated mission related to mobilization of veterans and military families. But such "indirect and incidental" injuries do not confer standing under Colorado law. *See, e.g.*, *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 17.

B. Vet Voice does not have associational standing.

Given the presence of diverse individual Plaintiffs during the Secretary's initial Motion to Dismiss, there was no reason to address Vet Voice's associational standing as to Count Two in particular. Now, without such individual Plaintiffs, Vet Voice fails all three prongs of the *City of Aspen* test when applied to disparate treatment claims based on race.

1. Vet Voice has not carried its burden of showing that its members have standing to sue in their own right.

In denying the Secretary's initial Motion to Dismiss, the Court resolved the first prong of the *City of Aspen* test by noting that "the individual plaintiffs, whose interests are also

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[2] There is nothing "offensive" about the Secretary's argument that Vet Voice must demonstrate an organizational focus and commitment to remedying racial inequities before claiming that it speaks and advocates on behalf of racial minorities in this matter. *See* Pls.' Opp. at 7.

represented by Vet Voice, have standing to sue." Order on Mot. to Dismiss at 3 (April 17, 2023). This is no longer the case, as Vet Voice recognizes. Accordingly, Vet Voice has the burden of showing that "its members would otherwise have standing to sue in their own right." *City of Aspen*, 2018 CO 36, ¶ 10. It cannot do so.

First, Vet Voice does not have members. It has "supporters," who are "people who have opted in to [Vet Voice] communications[.]" *See* Ex. E to Mot. to Dismiss Count Two at 46:2–16 (Nov. 20, 2023). But the *City of Aspen* test has never been applied to grant standing to a non-membership organization. *See, e.g.*, *Stanczyk v. Poudre Sch. Dist. R-1*, 2020 COA 27M, ¶¶ 42–49 (union). *Cf.* Order on Mot. to Dismiss at 4 (declining to expand *City of Aspen* requirements).

Second, Vet Voice offers no evidence that its "supporters,"—the people it claims are equivalent to its members—have standing to maintain this action. Instead, Vet Voice transitions from referencing "supporters who are members of the racial minority groups at issue here," Pls.' Opp. at 8 (citing Goldbeck Decl. ¶ 7)[3] to statistics about its "constituents," Pls.' Opp. at 9 ("It is mathematically obvious that there are Vet Voice constituents (veterans) who are members of the minority groups in question . . . ."). Vet Voice's "constituents," unlike its "supporters" have not opted-in to any involvement with the organization. *See* Ex. E to Mot. to Dismiss at 48:13–20. In *Hunt v. Wash. State Apple Advert.*, 432 U.S. 333, 344–45 (1977), on which the *City of Aspen* court relied, 2018 CO 36, ¶ 10, it was established that the individuals whose standing an

[3] Paragraph 7 of the Goldbeck Declaration does not refer to supporters, but instead the percentages of "living veterans" that are racial minorities.

association tries to invoke must possess "some indicia of membership" in the organization. Vet Voice's "constituents" possess no such indicia, and are ill-suited to have their interests represented by an organization with which they have not chosen to associate.

Third, as Vet Voice notes, federal law is relevant to this inquiry. Pls.' Opp. at 8 n.3. And the U.S. Supreme Court has expressly rejected Plaintiffs' proposed "mathematically obvious" test for associational standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–99 (2009) (rejecting standing on the basis of a "statistical probability that some . . . members are threatened with concrete injury). Instead, the requirement that plaintiffs "nam[e] the affected members has never been dispensed with in light of statical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Id.* at 498–99.

2. An interest in disparate treatment of racial minorities is not germane to Vet Voice's purposes.

Next, Vet Voice offers no reason for that assertion that remedying racially disparate treatment is germane to its organizational purpose other than that some veterans are racial and ethnic minorities. Pls.' Opp. at 9 (citing Goldbeck Decl. ¶ 7). But again, nothing in Vet Voice's mission statement or articulation of its injury relates to the allegedly disparate treatment of racial minorities. On Plaintiffs' theory, any organization could maintain race-based claims so long as it purports to represent some minorities. No Colorado court has approved such a dramatic rule.

And for good reason. The test for associational standing is a proxy for whether the organization is a suitable representative for the allegedly injured individuals. Vet Voice may be an appropriate representative for veterans whose right to vote has been allegedly burdened. It is not for racial minorities who were allegedly disparately treated by Signature Verification.

3. The disparate treatment claim requires individual participation.

By definition, a disparate treatment claim involves the comparison of an individual to a "similarly situated" comparator. *See, e.g.*, *Bd. of Cnty. Commrs. of Saguache Cnty. v. Flickinger*, 687 P.2d 975, 983 (Colo. 1984). Neither the parties, nor the Court, can identify "similarly situated" voters without the identification of persons who were allegedly discriminated against.[4]

According to Plaintiffs, Signature Verification disenfranchises tens of thousands of voters each year, and Vet Voice represents the interests of significant numbers of Colorado veterans. Yet despite ample opportunity to do so, Vet Voice cannot identify a single person—either as a Plaintiff or a representative member of Vet Voice—who has standing to pursue Claim Two as to disparate treatment of Black, Hispanic, and Asian voters.

III. Plaintiffs cannot advance claims premised on the disparate treatment of voters under the age of 27.

Plaintiffs agree that their youngest Plaintiff is 27. Pls.' Opp. at 11. Plaintiffs offer no reason why they should nonetheless be able to bring claims premised on the disparate treatment of voters under that age. Instead, they only note that some of their articulations of the injury suffered by "young" voters were not limited to 18- to 21-year-olds. *Id.*

Plaintiffs cannot advance equal protection claims where they are not amongst the class of persons allegedly discriminated against. *See, e.g.*, *McKinley v. Dunn*, 349 P.2d 139, 142 (Colo.

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[4] For example, at trial the Secretary will prove that Plaintiff Erwin's ballot was not held for cure based on a signature discrepancy. Were Plaintiffs to base their disparate treatment claim on the treatment of Mr. Erwin's ballot (they are not), a "similarly situated" comparator would have to be identified using the unique facts of Mr. Erwin's circumstance.

1960). No Plaintiff is under the age of 27. Therefore, Plaintiffs cannot maintain a disparate treatment claim based on age premised on the treatment of voters under the age of 27.

CONCLUSION

Claim Two should be dismissed in its entirety.

Dated this 18th day of December 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December 2023, a copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS COUNT TWO FOR LACK OF SUBJECT MATTER JURISDICTION** was served, via Colorado Courts e-filing, on the following:

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